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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO [redacted] 241

NATIONAL BELLAS HESS, INCORPORATED,

Appellant,

VS.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

(ON APPEAL FROM THE SUPREME COURT OF ILLINOIS)

MOTION TO DISMISS.

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Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1423

NATIONAL BELLAS HESS, INCORPORATED,
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vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

(ON APPEAL FROM THE SUPREME COURT OF ILLINOIS)

MOTION TO DISMISS.

The Department of Revenue of the State of Illinois, appellee herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the ground that said appeal does not present a substantial federal question.

ARGUMENT.

The appellant states the issue in this case in these words "whether a State may constitutionally require an out-of-State business to collect and pay the taxes levied on its residents' subsequent use of the goods where the out-of-State business has only two points of contact with the jurisdiction: (1) it regularly mails catalogs and flyers soliciting mail orders into the State as a part of a nation-wide distribution and (2) it ships goods which it has sold into the State by mail or common carrier" (*Jurisdictional Statement* page 8).

This is a correct statement of the issue in this case. Appellant stresses the importance of the issue by stating that this is a question that has never been decided by this Court and citing the report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee which stated the question is "the most important judicial uncertainty at present." (*Jurisdictional Statement* page 9).

The question is uncertain and substantial only if the cases on the power of a state to require an out-of-state seller to collect a use tax on sales to its residents are read with emphasis on facts in each case which this Court did not deem significant in deciding them. If these cases are read as a unit and their rationale clearly understood, it becomes abundantly clear that this case was correctly decided by the Illinois Supreme Court and that no substantial federal question is presented by this appeal.

Early important cases in the development of the law on this issue were *Nelson* v. *Sears Roebuck and Co.*, 312 U.S. 359 and *Nelson* v. *Montgomery Ward*, 30 U.S. 373. In these cases this Court held a state could compel a retailer with retail stores in a state to collect a use tax on sales to

its residents even though these sales were made from out-of-state branches on the basis of catalog orders. In the latter case the following significant comment was made by the Court:

> "There is a further fact in this record which makes reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward and Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog. This stipulation clearly means that respondent has solicited mail order sales in Iowa. The fact that such solicitation was done through local advertising rather than directly by local agents as in *Felt* and *Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 59 S.Ct. 376, 83 L.Ed 488 is immaterial. Nor is it material that the orders were filled by direct shipments from parts outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt and Tarrant Mfg. Co.* v. *Gallagher*, supra."

Thus there was an express holding by this Court that solicitation by advertising in the state was the equivalent to solicitation by local agents and that either was sufficient to support the legislative jurisdiction of the state to require that the out of state retailer collect a use tax on its sales to residents of that state. Thus is the situation in the instant case.

In *General Trading Co.* v. *Tax Commission* 322 U.S. 335, the Court reaffirmed its position that the presence of local agents or retail outlets is immaterial with regard to the power of a state to compel an out-of-state retailer who regularly solicits business in a state to collect a use tax on its sales to residents in that state. Although on the

facts on the case the company did solicit orders by travelling salesmen in the state the Court said at page 338:

> "The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a state as in *Gallagher* case, compared with the apparently similar needs for soliciting business in this case. And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail orders forwarded into Iowa from without the state. All these differentiations are without constitutional significance."

If as this Court indicated the presence of the retail stores was constitutionally irrelevant in the *Sears* and *Montgomery Ward* cases, the remaining facts are identical with those in this case—solicitation of sales in a state on the basis of catalogs shipped into the state by an out-of-state retailer. The instant case has been forseen and decided by this Court.

From a chronological standpoint the next significant case was *Miller Bros.* v. *Maryland,* 347 U.S. 340. In that case the defendant was a department store located in Delaware, and the issue was whether Maryland could require this defendant to collect its use tax from Maryland residents who came to its store to purchase goods. Its contacts with Maryland were as follows:

1) It advertised in Delaware newspapers and on its radio stations which advertising was heard and read by Maryland residents.

2) Occasional sales circulars were mailed to all former customers some of whom resided in Maryland.

3) It delivered goods purchased at its store by Maryland residents to their homes by common carrier and by its own truck.

This Court held that this contact was insufficient to support Maryland's legislative jurisdiction. The Court explained the *rationale* of its decision at page 347:

> "[T]here is a wide gulf between this type [the type in the *General Trading* case] of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland."

Thus this Court in a five to four decision reversed the case on the basis that the company there involved was not exploiting the consumer market in Maryland. The facts in the instant case are far different for even the issue as stated by the appellant shows that through regular and continuous catalog mailings to Illinois residents there is an exploitation of the Illinois consumer market of such a nature which justifies the State of Illinois' requirement that appellant collect the use tax on its sales to Illinois residents.

The latest expression of the views of this Court are this issue is found in the decision of *Scripto* v. *Carson* 362 U.S. 207 where this Court held that the regular solicitation of orders in Florida by ten "independent contractors" who were agents of Georgia corporation which had no other contact with Florida was a sufficient nexus to support the requirement that the corporation collect the Florida use tax on its sales to Florida residents. In distinguishing the *Miller Brothers* case this Court again emphasized the fact that the exploitation of the consumer market in a state is the key to its legislative jurisdiction on this issue and that

catalog solicitation may be sufficient for this purpose. The Court said at page 212:

> "Appellant earnestly contends that *Miller Bros. Co.* v. *Maryland, supra* is to the contrary. We think not. Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular systematic displaying of its products by catalogs, samples or the like."

Clearly to say that the existence of ten part-time independent contractors in a state who accept orders for out-of-state firms is such an "exploitation of the consumer market" as would justify the legislative jurisdiction of a state to require it to collect a use tax on sales to the residents of the state but that regular and continuing catalogue solicitation in the state is not, is to elevate form over substance. No substantial differences exist between the two forms of solicitation.

Thus this Court has clearly, and on at least three different occasions stated that the existence of agents or retail outlets in a state is immaterial with regard to legislative jurisdiction of a state to require the collection of its use tax, but that rather the issue is whether there is such a regular and continuous solicitation in the state as to amount to an exploitation of its retail market.

The rationale behind this result in these cases is well expressed by Mr. Justice Rutledge in his opinion reported at 322 U.S. 349, in which he concurred in *Harvester Co.*, v. *Dept. of Treasury*, 322 U.S. 340, and the *General Trading case*, 322 U.S. 335 and dissented in *McLeod* v. *J. E. Dilworth Co.* in this opinion be said at page 354:

> "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines

this process in terms as 'a retailer maintaining a place of business in this state'. The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer."

Since the prior decisions of this Court thus establish that for these purposes regular solicitation is "doing business" in a state, there can be no question but that the State of Illinois had legislative jurisdiction over the appellant and thus the decision of the Supreme Court of Illinois in no way violated the Due Process Clause of the Fourteenth Amendment by making its laws applicable to appellant.

It is equally clear that there is no violation of the Commerce Clause. The burden on appellant is no greater than that placed on Sears Roebuck, Montgomery Wards or Scripto by the prior decisions of this Court. Indeed instead of discriminating against interstate business, this requirement merely treats all retailers who sell to Illinois residents equally. Any other result would discriminate against local business in favor of an out-of-state retail merchant.

Finally to require such a merchant to be subject to the *in personam* jurisdiction of courts of Illinois for the sole purpose of collecting any such funds not voluntarily collected, is not a violation of Due Process any more than requiring them to collect them in the first place. For these

purposes regular and continuous solicitation is the equivalent of "doing business", and it is well established the courts of the state have *in personam* jurisdiction over a corporation doing business within its borders.

Since the prior decisions of this Court make manifestly clear that continuous solicitation in a state is sufficient for a state to require an out-of-state retailer to collect a use tax on sales to its residents, and since the very issue as presented by appellants shows they are engaged in such solicitation, no substantial federal question is presented. The decision of the Illinois Supreme Court was clearly correct, and this appeal should be dismissed for failure to state a substantial federal question.

CONCLUSION.

It is respectfully submitted, therefore, that defendant presents no substantial federal question for the decision of this Court and that this appeal should be dismissed.

Respectfully submitted,

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